Petition

81-1141

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In The

Supreme Court of the United States

October Term, 1981

DONALD RIBOTSKY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Government's use of "RICO" in the case at bar exceeded its statutory scope and purpose?

2. Whether petitioner Ribotsky was denied a fair trial by the failure of the court, at nisi prius, to have granted a severance?

3. Whether this Court should, once and for all, resolve the issue left unsettled in *United States v. White*, 401 U.S. S745, as to whether court orders are required for electronic surveillance where only one party to such surveillance has knowledge thereof and consents thereto?

4. Whether the indictment should have been dismissed because "RICO" and "RICO conspiracy" do not apply to "criminal venture" types of enterprises and the joining of these counts violated Rule 8(b) of the Federal Rules of Criminal Procedure?

5. Whether the conjoining of so many defendants into a single "RICO" and single conspiracy to violate "RICO" charge necessarily created a prejudicial spillover which denied a fair trial and due process to the petitioner herein?

6. Whether the Civil Court of the City of New York is an enterprise within the purview of the "RICO" statute?

7. Whether petitioner was denied a fair trial?

8. Whether the concurring opinion of Judge Friendly of the Circuit Court, concluding that no "RICO" violation existed and thus a conviction on "RICO" should have been reversed, constitutes a basis for certiorari herein?

PARTIES

The parties in the United States Court of Appeals for the Second Circuit were the petitioner, as well as Peter Angelilli, William Butler, and Donald Irish.[1]

1. Petitioner herein joins in any petition for certiorari filed by any of the aforementioned co-appellants.

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I. The indictment herein, as Judge Friendly indicated in his concurring opinion in the court below and the proof adduced pursuant thereto, were insufficient to have warranted conviction of "RICO" violations. This Court should clarify the essential requirements of the "RICO" statute since it is being used to a very significant extent by prosecutors throughout the country. 10

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IV. Substantial electronic surveillance was conducted in the case at bar by use of a body recorder placed on Detective Edward Gruskin, who was an undercover agent posing as a buyer and auctioneer known as "Edward Grossman". Supposedly Gruskin consented to the use of electronic listening devices in conversations which he had with certain of the defendants. While allegedly justified under *United States v. White,* 401 U.S. 745, that case was prior to *Katz v. United States,* 389 U.S. 47, and *White* was a mere plurality opinion of the Supreme Court. Thus both the Fourth Amendment and the petitioner's "reasonable expectation of privacy" rendered the electronic surveillance unconstitutional and inadmissible without court orders. 18

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OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Second Circuit, decided the 4th day of September, 1981, is annexed hereto as an appendix.

JURISDICTION

A. The judgment of conviction was rendered the 7th day of November, 1981, convicting petitioner of violating the RICO statute, conspiracy to violate the RICO statute [18 U.S.C. §§1962(c) and (d)], the Hobbs Act, and mail fraud (Counts 1, 2,

10 and 23 of a multi-count indictment), after trial before Mishler, D.J., and a jury.

In addition to petitioner, the other co-defendants were likewise convicted of the RICO and RICO conspiracy violations, as well as other charges. The counts of the indictment, in essence, alleged that the defendants, including petitioner herein, all of whom were New York City Marshals, conducted auction sales of the property of judgment debtors and sold the items involved for less than their true value. The indictment further alleged that these marshals received payments for so doing and that they used the mails in connection with this alleged scheme.

B. The order and judgment of affirmance of the United States Court of Appeals for the Second Circuit is dated the 4th day of September, 1981, and the opinion in connection therewith is annexed hereto as an appendix. An order denying a rehearing was filed by the United States Court of Appeals for the Second Circuit on the 5th day of November, 1981, but a stay of mandate was granted pending the filing of this petition.

C. Jurisdiction to review the judgment in question by certiorari is conferred under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, Due Process Clause, is involved herein. The principle statutory provisions, so far as pertinent, are 18 U.S.C. §§1961(4); 1962(a); 1962(b); 1962(c); and 1962(d), the pertinent portions of which are set forth in an appendix hereto.

STATEMENT OF THE CASE

Initially, thirteen defendants were called to trial under the indictment, eleven of whom were New York City Marshals and two were auctioneers licensed by the Department of Consumer Affairs of the City of New York, who allegedly did business with some of these marshals.

A number of other individuals, many of whom were auctioneers, and some of them marshals, had also either been indicted or at least accused, in an informal sense, of violating these very statutes, but they never went to trial because they either took pleas of guilty or became cooperating witnesses and testified at the trial or rendered other help to the prosecution.

In essence, it is alleged that the marshals conducted auction sales of the property of judgment-debtors and sold the items involved for less than their true value. Allegedly these marshals then mailed the proceeds of the sales to attorneys for the judgment-creditors, falsely claiming that the remitted proceeds were the full amounts received at the sales when, in fact, the marshals allegedly received and held back additional money — "money on top" — from the buyers to whom the property had been sold at deflated prices.

The first count of the indictment sets forth a conspiracy through a pattern of racketeering activity in violation of Title 18, §1962(d). This first count also states that while employed by the Civil Court of New York, an "enterprise", as defined by Section 1961(4), which affected interstate commerce, they allegedly violated Section 1962(c)(3) pattern of racketeering activity. Moreover, they are accused of having violated the Hobbs Act, namely 18 U.S.C. §1951, through a pattern of racketeering activity, by obtaining the property of judgment-debtors, with their consent, under color of official right.

Finally, it is claimed in the indictment that these marshals violated Section 1341 of Title 18 of the United States Code by mailing payments to attorneys for judgment-creditors, which payments were less than the full amount received by them at auction sales.

Counts 2 through 25 of the indictment sets forth overt acts attributed to each defendant, as well as the facts related to the mailing of checks to attorneys for judgment-creditors.

We submit that the evidence does not reveal any conspiratorial action between the marshals who were indicted. We maintain that the evidence clearly demonstrates, if anything, that each marshal conducted his own business without regard to the other marshals, with perhaps one or two exceptions where more than one marshal was present at a particular sale.[2] But even in this case the situation seems manifest that a separate conspiracy would have existed, if at all, between those particular marshals, and that no one overall conspiracy was ever established.

Particularly in the case of Donald Ribotsky, the petitioner herein, we maintain that the evidence as against him is so threadbare and sparse that it should not have been submitted to the jury at all.

In essence, the indictment alleged that the Civil Court of the City of New York was the underlying enterprise, to satisfy the RICO statute.

The evidence against Ribotsky primarily came from Detective Edward Gruskin, who posed as "Edward Grossman",

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2. At no sale were there more than three marshals, only one of whom conducted the sale, and the occurrence was very rare.

acting in an undercover capacity, pretending to be a buyer and an auctioneer at some of the marshals' sales.

Gruskin was present at a number of marshals' sales, but only one of which was conducted by petitioner Ribotsky, namely the so-called "Capitol Hosiery" sale.

Despite the fact that a number of the co-conspirators who testified in favor of the Government were present at that time, including Robert Rappaport, one of the main witnesses for the Government, Gruskin admitted that at no time did the petitioner Ribotsky ask for or request in any manner any "money on top" or propose any improprieties. The sale was conducted at arms-length and if there were any bent on the part of Ribotsky to act illegally, certainly it would have been manifest in this particular sale and nothing of that sort occurred.

After the sale itself was consummated, Detective Gruskin stated that the petitioner suggested that he give $50 to the superintendent to watch the premises and to make them available to Gruskin (using the name "Grossman"), who had been the successful bidder.

Gruskin stated that he gave the marshal, without any solicitation on the marshal's part at all, a hundred dollar bill as a *tip* on that occasion. Admittedly, there was a tape going at the time, and yet there was no indication that this was actually given to the marshal, according to the transcript and tape as it existed then.[3]

As a matter of fact, Robert Rappaport, who testified for the Government and who knew Marshal Ribotsky for many years,

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3. Afterwards, a recording expert hired by the Government allegedly refined the tape so other words could be discerned, but this was done after *Gruskin* testified and *sans* opportunity to cross-examine the expert.

head that tape himself and stated that the conversation which allegedly appeared on that tape between Gruskin and Ribotsky, was not the voice of Donald Ribotsky at all. The court nevertheless let the tape in. The tape was completely equivocal and showed nothing along the lines of a violation of this statute because the sale was totally consummated and there was nothing further the marshal could do. There was obviously no extortion, nor was there any effort to solicit a bribe. The hundred dollars allegedly given to Ribotsky by Gruskin, admittedly without solicitation on the part of Ribotsky, could have been no more than a tip, and this certainly does not meet the fact pattern of this case. Nor does it comply with the statutory requirements of this indictment.

It was stipulated that there were no complaints filed with the Department of Consumer Affairs of any significance against Ribotsky. In that, we mean that no complaints that required any further action on the part of the Department of Consumer Affairs were ever filed against Ribotsky.

Ribotsky had less sales than any other marshal in the case and, moreover, had worked for his father, who was a City Marshal for many years.

While it is true that Robert Rappaport also testified against Ribotsky, he admitted that on several occasions he had told his former counsel, who happened to represent the petitioner Ribotsky, that he would lie under any circumstances to help himself and that the truth was merely a matter of convenience as far as Rappaport was concerned. He had conceded on cross-examination that on many occasions he invented stories, told lies, or anything else that would suit his convenience, if it would assist him in any way, shape or form.

Thus we believe that the credibility of Rappaport, so far as Ribotsky is concerned, should have been rejected by the court as not being worthy of presenting to a jury. As a matter of fact, Rappaport had been convicted of lying under oath and also of contempt. He was a co-defendant in this very indictment, and at the last minute decided to cooperate with the Government and obviously was seeking to get out from under another State indictment, which he did very nicely.

During the trial a very serious error affecting petitioner Ribotsky particularly occurred, when the Government sought to play and actually did play, over objection, a tape of Exhibit GG-1 (4403-4412).[4] The tape involved was 112 A (4415). That tape *contained two different recordings* — one involving the so-called "Mr. David" transaction, and the other involving "Capitol Hosiery", which affected only Mr. Ribotsky directly.

By insidious design, or otherwise, *counsel for Ribotsky was not informed* of the fact that tape 112 A contained anything involving "Capitol Hosiery", so when the "Mr. David" transaction was introduced into evidence, no one was told that later on in that same tape was a transaction involving Mr. Ribotsky and "Capital Hosiery". Thus, tape 112 A, which had never been introduced into evidence as against Mr. Ribotsky on the "Capital Hosiery" case, was permitted to be played to the jury because the first portion of that tape, involving a wholly different transaction and a different defendant, had been introduced into evidence.

This was clearly a "trial by ambush". The tape was, in fact, played over vehement objection (4415-4419).

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4. Numerals in parentheses refer to pages of the official court reporter's minutes of trial unless otherwise indicated.

In addition, a tape recording expert was permitted to revise and re-record the tape recording of the "Capitol Hosiery" transaction, and thus new language which had never been heard during the trial or during the cross-examination of the important witness, Detective Gruskin, was, for the first time, played during the summation of the prosecution, again over objection (4419-4421). This denied Mr. Ribotsky a right of confrontation, in violation of the Sixth Amendment.

During the deliberations of the jury the veniremen sought to listen to tape cassette 112 A (Exhibit GG-1), involving "Capital Hosiery", and the objections of defense counsel for Ribotsky were again repeated and the *court finally realized the error* it had made and told the prosecutor not to play the tape because it had never been introduced into evidence. Unfortunately, however, during the Government's summation they had already heard that tape, over objection, and the damage was already done. No instruction to disregard the tape was given.

We maintain that the court erred with respect to the introduction of cassette tape 112 A (GG-1), because the Government was permitted to "put something over" on all concerned by playing a tape cassette which had been introduced only with respect to a transaction involving a different defendant, concerning the "Mr. David" transaction, but also contained, further on during the tape, a recording of a transaction involving Mr. Ribotsky at the "Capital Hosiery" auction sale. Since only in the "Capitol Hosiery" sale was Mr. Ribotsky directly involved with Detective Gruskin, the undercover officer, it was a very crucial tape.

The court, during the deliberations of the jury, realizing its error, did not allow the tape to be played again, but gave no instruction to the jury to disregard it. We submit that the facts, even on "Capital Hosiery" were insufficient because no money

whatsoever was ever requested by Ribotsky or offered, until the whole sale had been fully consummated and a successful purchaser had emerged. After the entire sale was over and done with, one of the successful purchasers decided to offer a "tip" of $100 to Mr. Ribotsky because he had been of some help in enlisting the aid of a superintendent to protect the merchandise which was the subject of the sale.

Since the sale was a *fait accompli,* this $100 could not be deemed a "bribe" and, consequently, could not have influenced the conduct of Mr. Ribotsky because the transaction had been concluded. Nothing on the tape recording transcript, which was originally submitted to counsel, indicated that Mr. Ribotsky said anything, or even acknowledged receiving $100.

A refined version of the tape recording, which was manufactured by an electronic expert working for the Government, for the first time elicited a voice that might have been Mr. Ribotsky's or Detective Gruskin's, referring to $100. That transcript and tape were not in existence when Mr. Rappaport testified against Mr. Ribotsky; nor when Detective Gruskin testified against him, but only during the summation of the prosecutor.

REASONS FOR GRANTING THE WRIT

I.

The indictment herein, as Judge Friendly indicated in his concurring opinion in the court below and the proof adduced pursuant thereto, were insufficient to have warranted conviction of "RICO" violations. This Court should clarify the essential requirements of the "RICO" statute since it is being used to a very significant extent by prosecutors throughout the country.

A prosecution under the Racketeer Influenced and Corrupt Organizations statute (RICO), 18 U.S.C. §1961 *et seq.*, presents the basic issue "What must be charged in a RICO conspiracy count to make it legally sufficient?"

We submit that the minimum requirement is that each defendant must be charged with agreeing to commit two or more specific predicate crimes, as well as agreeing to participate in the conduct of an enterprise's affairs, through a pattern of racketeering activity.

While the statute asserts that two or more predicate acts of racketeering constitutes a "pattern of racketeering", it does not make clear the extent of activity necessary on the part of each conspirator.

In the case at bar, Ribotsky was linked, at most, with one discernable act, namely the "Capitol Hosiery" violation. In that instance, however, even the undercover officer, Detective Gruskin, conceded that the sale (auction) upon which the indictment was predicated, was run without any impropriety. It was only after the sale had been consummated that any impropriety was alleged to have occurred, and that was in connection with a "tip" which was given to Ribotsky, which

"tip" could not have affected the sale itself because the sale was already a *fait accompli*.

The other acts, namely the mail fraud and Hobbs Act violation (18 U.S.C. §1951), were necessarily dependent upon this same alleged transgression.

Thus, we maintain that the Government failed to show the actual commission of two predicate acts by each defendant in order to demonstrate their agreement to participate in the conspiracy.

Guilt by association is the thrust of what occurred in the case at bar.

In *Krulewitch v. United States*, 336 U.S. 440 at 457, after a survey and criticism of the federal law of conspiracy, Justice Jackson declared:

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges . . . And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the *purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.*" (Emphasis added.)

One of Justice Jackson's criticisms of the federal law of conspiracy was that it reduced the Sixth Amendment right to trial to a sham. Referring to *Hyde v. United States*, 225 U.S. 347 (1912), he said:

> "Mr. Justice Holmes, on behalf of himself and Justices Hughes, Lurton and Lamar, wrote a vigorous protest which did not hesitate to brand the doctrine as oppressive and as 'one of the wrongs that our forefathers meant to prevent.'" at 452-3.

In *Kotteakos v. United States*, 328 U.S. 750, 773 (1946), where, as here, a single conspiracy was alleged, but multiple conspiracies were proved, that Court, reversing for this reason, stated that the proceedings of a mass trial "are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass", and continued:

> ". . . Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal

> trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

The Court in *Krulewitch* continued, explaining:

> "The naive assumption that the prejudicial effects can be overcome by instructions to the jury, *c.f.*, *Blumenthal v. United States*, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949).
>
> ". . . the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." (L. Hand, J.) *Nash v. United States*, 54 F. 2d 1006, 1007 (C.A. 2, 1932).

II.

The motions for severance made by Ribotsky should have been granted because there was a misjoinder of him as a defendant, which was highly prejudicial.

Since Ribotsky was really connected with only one alleged violation where he acted as marshal (Capitol Hosiery), but numerous acts on the part of other defendants were introduced, there was clearly a misjoinder as to him. There was a failure in the conspiracy count to establish a nexus between Ribotsky and two or more predicate crimes constituting a "pattern of racketeering activity".

In the light of this Court's recent decision in *United States v. Turkette*, ____ U.S. ____, 29 Cr. L. 3086 (1981), a "RICO"

conspiracy must charge an "enterprise" and "pattern of racketeering activity" separately. These elements are defined in the statute; in particular, Section 1961(5), wherein, the following language appears: "Pattern of racketeering activity" requires at least two acts of racketeering activity.

The statute, however, does not make clear the extent of the activity in which each defendant must engage to be culpable as a "RICO" conspirator.

In other words, the court must decide whether it is necessary that "RICO" conspiracy defendants agree that someone in the enterprise will commit two predicate crimes.

This Court should also determine whether it is necessary to prove that each member of the conspiracy agreed to commit two such acts individually or whether it is necessary that each member actually committed two such acts individually.

The foregoing enigmas have never been explained by this Court.

Cf., United States v. Elliot, 571 F.2d 880 (5 Cir. 1978).

The *Elliot* court had said that while the gargantuan criminal scheme involved there could probably not be charged as a single conspiracy under pre-RICO concepts, a "RICO" conspiracy could exist, but it went on to say that each conspirator must have "objectively manifested an agreement to participate directly or indirectly in the affairs of an enterprise through the commission of two or more predicate crimes". But it has also been held that conspirators need not have accomplished their underlying criminal goals to be found guilty of conspiracy (*see United States v. Cruz*, 568 F. 2d 781, 782-83 (1st Cir. 1978).

Requiring one to *knowingly* join an enterprise and agree to commit two or more predicate crimes provides sufficient protection to those who might otherwise be convicted through guilty by association. It is therefore patent that a "RICO" conspiracy count can be established only if the Government, at a very minimum, establishes beyond a reasonable doubt that each defendant agreed to commit two or more specified predicate crimes, in addition to charging an agreement to participate in the conduct of an "enterprise's" affairs through a pattern of racketeering activity. (*See United States v. Winter*, ____ F. 2d ____, (1st Cir. 10/31/81), 30 Cr. L. 2150, 2151.)

Judge Friendly's partial dissent and partial concurrence specifically declares that the "New York Civil Court" cannot be deemed an "enterprise" within the meaning of 18 U.S.C. §1962(b).

This incisive opinion distinguishes *United States v. Turkette, supra*, 49 L.W. 4743, noting that this Court criticized the First Circuit for reading "legitimate" into the congressional definition of "enterprise". The judge noted, however, that the question in the case at bar is whether there is any justification for expanding the term to include something that would normally be deemed to fall outside it. Thus, Judge Friendly, explains:

> "Conceivably the group of marshals who engaged in the sordid activities described by the majority could be deemed an 'enterprise'. But that was not what the indictment charged or what the jury was told it must find in order to convict. It is of no consequence, as the majority urges, that obstruction of law enforcement is included in the definition of 'racketeering activity' in §1961(1). As the Court said in *Turkette, supra*, 49 L.W. at 4745:

> 'The "enterprise" is not "the pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.'

For these reasons, as well as others expressed by Judge Swygert dissenting in *United States v. Graywacz*, 603 F. 2d 682, 690 (7d Cir. 1979), *cert. denied*, 446 U.S. 935 (1980), I would vacate the convictions under RICO, 18 U.S.C. §1962(c) and (d), but would allow those under the Hobbs Act, 18 U.S.C. §1951, and the mail fraud statute, 18 U.S.C. §1341, to stand."

III.

The proof in the case at bar does not establish participation in a "pattern of racketeering" by petitioner Ribotsky. This Court should clarify the amorphous and enigmatic definition of the statute [18 U.S.C. §§1962(c) and 1961(5)].

To the extent that courts permitting illegal enterprises have eliminated the enterprise element from Section 1962(c), they have transformed that subsection into a direct prohibition against the commission of a pattern of racketeering activity.

Section 1961(5) does not actually define a "pattern of racketeering activity", but states that it "requires at least two acts of racketeering activity", one of which occurred after the effective date of this chapter and the last of which occurred within ten years "after the commission of a prior act of racketeering".

It should be noted in this context that 18 U.S.C. §1961(5) may violate the constitutional prohibition on *ex post facto* laws (U.S. Const. Art. I, §9, Cl. 3) because it permits the prosecution of activities that occurred prior to its effective date [*cf., United States v. Herman,* 589 F. 2d 1191, 1198 (3 Cir. 1978), *cert. denied,* 441 U.S. 913 (1979); *United States v. Brown,* 555 F. 2d 407, 418-21 (5 Cir. 1977), *cert. denied,* 435 U.S. 904 (1978) and *United States v. Campanale,* 518 F. 2d 352, 357, 365 (9 Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976)].

In accordance with Section 1961(5), the courts have insisted that one isolated racketeering act does not constitute a "pattern" [*United States v. Morris,* 532 F. 2d 436, 442 (5 Cir. 1976); *United States v. Campanale, supra,* and *United States v. Ladmer,* 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977)].

The more significant and complex question that arises is whether the commission of two or more acts of racketeering will always constitute a "pattern". The report of the Senate Judiciary Committee on the proposed Organized Crime Control Act (S. Rep. No. 617, 91st Cong. 1st Sess. 215 at 158) cautioned that the target of Title IX is thus *not* sporadic activity.

The infiltration of legitimate business normally requires more than one racketeering activity, and the threat of continuing activity, to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

See Senator McClellan's vigorous assertion that the commission of two racketeering acts does not establish a pattern in the absence of a relationship between the acts [116 Cong. Rec. 18940, 91st Cong. 2d Sess. (1970); *see* House Hearings on Organized Crime Control on S.30 and Related Proposals before Sub-Committee No. 5 of the House Committee on the Judiciary, 91st Cong. 2d Sess. 170 (1970) — Statement of Attorney General Mitchell].

The hearings established that it was prevention of infiltration which was the principal goal. Indeed, few statements in legislative history rebut the restricted view. (*See* Tarlow, "Rico: The New Darling of the Prosecutor's Nursery", 49 Fordham L. Rev. 165, 210-220).

IV.

Substantial electronic surveillance was conducted in the case at bar by use of a body recorder placed on Detective Edward Gruskin, who was an undercover agent posing as a buyer and auctioneer known as "Edward Grossman". Supposedly Gruskin consented to the use of electronic listening devices in conversations which he had with certain of the defendants. While allegedly justified under *United States v. White*, 401 U.S. 745, that case was prior to *Katz v. United States*, 389 U.S. 347, and *White* was a mere plurality opinion of the Supreme Court. Thus both the Fourth Amendment and the petitioner's "reasonable expectation of privacy" rendered the electronic surveillance unconstitutional and inadmissible without court orders.

The Government elected to use electronic surveillance in this case, probably in an attempt to corroborate the statements of their single most important witness, Gruskin.

The use of electronic surveillance where only one party consents to the eavesdropping has been employed very widely since the Supreme Court's decision in *United States v. White*, 401 U.S.745. It, of course, had also been used previous thereto, but many law enforcement agencies apparently look upon *White* as authorization or *carte blanche* to use this method of electronic surveillance.

It is respectfully contended that *White* was a plurality opinion of the Supreme Court of the United States and was decided prior to *Katz v. United States*, 389 U.S. 347, 364.

Just a mere plurality of the Supreme Court voted to save the "misplaced confidence" doctrine of *On Lee v. United States*, 343 U.S. 747 and *Lopez v. United States*, 373 U.S. 427.

This "misplaced confidence" exception to the normal warrant requirement is inconsistent with the "reasonable expectation of privacy" standard of *Katz v. United States*, 389 U.S. 347, and we maintain should therefore be abolished. [*See Holmes v. Burr*, 486 F. 2d 55 (9 Cir. 1973), *cert. denied*, 414 U.S. 1116.]

It will be recalled that Justice Black's cryptic concurrence in *United States v. White, supra*, mentioned the fact that it did not apply since this was pre-*Katz* eavesdropping.

Justice Black cast the swing vote in *United States v. White*, and his concurrence in the judgment of the Court was for the reason set forth in his dissent in *Katz v. United States*, 389 U.S. 347, 364. However, he also noted "his adherence" to "his views expressed in *Linkletter v. Walker*, 381 U.S. 618." In *Linkletter*, Mr. Justice Black maintained that *Mapp v. Ohio*, 367 U.S. 643, should have been applied retroactively.

It must be borne in mind that in his concurrence in *United States v. White*, Justice Black reasserted the position which he had taken in *Katz*, namely that electronic surveillance was not within the ambit of the Fourth Amendment.

In *Katz v. United States*, however, the Supreme Court made it very clear that seizure of the spoken word was within the purview of the Fourth Amendment and, consequently, Black's

concurring and controlling fifth vote is inapplicable in view of *Katz v. United States.*

It is argued that: (1) electronic recording produces more reliable evidence than human recollection; (2) that law enforcement authorities need unhampered electronic surveillance to protect us from crime; and (3) that the exclusion of evidence obtained in this way hurts society. These arguments do not hold up.

Evidence obtained by machine is not necessarily more reliable than human recollection. A machine has considerable ability to distort. It focuses on a single element in a total environment and can yield deceptive results. A recorder captures voices without facial expressions, gestures and other subtle details. Nor is a picture any more accurate. But the reliability argument really is irrelevant. Evidence obtained by illegal search or seizure is excluded not because of unreliability, but because of the values its exclusion protects.

As for the second argument, the Government's legitimate interest in detecting and preventing crime must be balanced against the individual's freedom from unjustified intrusions. That balance was struck by the draftsmen of the Fourth Amendment when they required advance authorization of searches and seizures by a magistrate upon a showing of probable cause.

Rarely articulated but frequently evinced hostility to the Exclusionary Rule underlies the third argument:

> "The case presents some of the most vexing and pressing problems of our day: What are the constitutional limitations on governmental electronic intrusions into privacy? Do the Fourth

> and Fourteenth Amendments circumscribe warrantless electronic intrusions as effectively as they limit corporeal invasions of privacy? Are the protections of the Fourth and Fourteenth Amendments diluted if the person subjected to the warrantless electronic intrusion is suspected of a crime? (Dissent of Hufstedler, J. in *Holmes v. Burr, supra.)*

The dissenting opinion in *Holmes v. Burr, supra,* went on to explain the impact of warrantless surveillance:

> "The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely, no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has sanctioned a secret recording of their conversation. . . ."

The holding of *Olmstead* was finally overruled in *Katz v. United States.* There the Court explained:

> "The Fourth Amendment protects people, not places."

Tucked into *Olmstead* was a passing reference to the theory that persons subjected to warrantless electronic interception volunteer their statements to the Government by their very act of talking to each other. This theory later emerged as the constructive consent and assumption of a risk fictions relied on in *On Lee v. United States, supra,* 343 U.S. at 753-54 and *Lopez*

v. United States, supra, 373 U.S. at 439. In *Lopez*, the majority added the variation that a person talking face-to-face with a known government agent assumes the risk that the agent will be able to repeat the conversation either by total personal recall or by a corroborative recording which in its nature is more reliable than human recollection. The theme was replayed in a slightly different key by the plurality in *United States v. White*.

Using familiar jurisprudential tools, *Holmes* can be successfully distinguished from every Supreme Court decision directly bearing on the case other than *Katz*. Thus, *On Lee* and *Lopez* not only are factually dissimilar but, more importantly, were based on trespassory concepts discredited by *Silverman v. United States*, 365 U.S. 505 (1961); *Osborn v. United States*, 385 U.S. 323; and *Berger v. New York*, 388 U.S. 41 and destroyed by *Katz*. *Rathbun v. United States*, 355 U.S. 107 (1957), dealt with governmental eavesdropping by extension telephone without electronic recording, and the decision was confined to an interpretation of Section 605 of the 1934 Federal Communications Act (47 U.S.C. Section 605). *Schwartz v. Texas*, 344 U.S. 199 (1952), involved facts similar to *Rathbun*, but the decision was based on the pre-*Mapp* authority refusing to apply the exclusionary rule to state courts. *Schwartz* was overturned by *Lee v. Florida*, 392 U.S. 378 (1968), a post-*Mapp* case, holding inadmissible under Section 605 telephone conversations overheard on a party line and recorded. *Lewis v. United States*, 385 U.S. 206 (1966) and *Hoffa v. United States*, 385 U.S. 293 (1966), like *Holmes*, concerned the use of confidants who were secretly governmental informers, but in neither case was electronic surveillance employed. The facts in *White* were closer to those in *On Lee* than to *Olmstead* or *Holmes*. But of much greater significance, *White* necessarily applied pre-*Katz* law because the electronic surveillance of *White* occurred before *Katz* was decided, and *Katz* had been earlier held nonretroactive in *Desist v. United States*, 395 U.S.

244 (1969). *United States v. White*, is nevertheless important because it reveals continuing reliance by some of the justices on the assumption of the risk doctrine. [*See United States v. White*, at 754 (White, J.).]

Although the holding in *White* was based upon the non-retroactivity of *Katz*, several of the justices did express views on the effect of *Katz* on participant electronic surveillance. Mr. Justice White, writing for the Chief Justice and Justices Stewart and Blackman, suggested that *On Lee* remained sound law. Justices Brennan, Douglas, Harland and Marshall each wrote separate opinions arguing that the result in *On Lee* could not survive *Katz*. Mr. Justice Black, concurring in the judgment of the Court, did not address this issue, merely reasserting the position taken in his *Katz* dissent that electronic surveillance was not within the ambit of the Fourth Amendment.

Proponents of the assumption of the risk doctrine, apparently recognizing the significant intrusion upon an individual's privacy caused by participant monitoring, do not say that everyone must anticipate and risk warrantless surveillance; rather, they limit its application to those who contemplate illegal activity. But never do these proponents explain how, absent the Fourth Amendment requirement of antecedent justification before a neutral magistrate, the sinful can be separated from the saintly without probing everyone or leaving the selection to the unbridled discretion of government agents.

Adoption of the assumption of the risk theory ultimately rests on the cynical conclusion that a warrantless search is justified by what it reveals.

In the conclusion of her dissenting opinion, Judge Hufstedler, in *Holmes v. Burr, supra*, sets forth cogent argument

indicating how destroying a right protected by the Fourth Amendment because of distaste for the remedy, ultimately destroys the Fourth Amendment itself. In 14 Cr. L. 2063, the dissent explained:

> "Dissatisfaction with the exclusionary rule as the predominate remedy for conduct violating the Fourth Amendment is understandable and defensible. Attacks on the constitutional right of privacy as the means of expressing dissatisfaction with the remedy are intellectually indefensible and dangerous. A constitutional right continuously diluted becomes no right. Destroying a right protected by the Fourth Amendment because of distaste for the remedy makes little more sense than destroying a patient for failure to respond to chosen medication. If the remedy is wrong, it is time to reexamine the remedy, not to diminish the right."

In *Gelbard v. United States,* 408 U.S. 41, 92 S. Ct. 2357, the Supreme Court held that the use of illegal electronic interceptions are proper defenses under certain circumstances. *See also, United States v. Giordano,* 416 U.S. 505, 94 S. Ct. 1820.

CONCLUSION

The petition for certiorari should be granted.[5]

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

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5. We join in the petition of any co-appellants.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1039-42—September Term, 1980

(Argued March 12, 1981 Decided September 4, 1981)

Docket Nos. 80-1431, -1434

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

PETER ANGELILLI, WILLIAM BUTLER, DONALD IRISH, and DONALD RIBOTSKY,

Defendants-Appellants.

Before:

FRIENDLY, MANSFIELD, and KEARSE,

Circuit Judges.

Appeals from judgments of conviction entered in the United States District Court for the Eastern District of New York, after a trial before Jacob Mishler, *Judge*, and a jury, for violations of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. §§ 1962(c) and (d), extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and use of the mails to defraud in violation of 18 U.S.C. § 1341.

Convictions of appellants Butler, Irish, and Ribotsky affirmed. Conviction of appellant Angelilli affirmed as to violations of 18 U.S.C. §§ 1962(c), 1962(d), and 1951; judgment remanded for correction to reflect acquittal as to 18 U.S.C. § 1341.

RONALD G. RUSSO, Special Assistant United States Attorney, Brooklyn, New York (Edward R. Korman, United States Attorney for the Eastern District of New York, of counsel), *for Plaintiff-Appellee.*

GILBERT S. ROSENTHAL, New York, New York, *for Defendant-Appellant Angelilli.*

CHARLES HAYDON, New York, New York, *for Defendant-Appellant Butler.*

WILLIAM SONENSHINE, Brooklyn, New York, *for Defendant-Appellant Irish.*

IRVING ANOLIK, New York, New York, *for Defendant-Appellant Ribotsky.*

Opinion

KEARSE, *Circuit Judge:*

Defendants Peter Angelilli, William Butler, Donald Irish, and Donald Ribotsky appeal from judgments of conviction entered after a jury trial in the United States District Court for the Eastern District of New York, Jacob Mishler, Judge. The trial and convictions related to acts of defendants as Marshals of the Civil Court of the City of New York, in conducting fraudulent auctions of the property of judgment debtors in that court. All defendants were convicted of engaging in a pattern of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. § 1962(c) (1976), of conspiring to violate RICO, in violation of 18 U.S.C. § 1962(d) (1976), and of extortion under "color of official right" in violation of the Hobbs Acts, 18 U.S.C. § 1951 (1976). In addition, Butler, Irish, and Ribotsky were convicted of using the mails to further a scheme to defraud in violation of the mail fraud statute, 18 U.S.C. § 1341 (1976); Angelilli was acquitted on the mail fraud charge, although the judgment as to him mistakenly states that he was convicted on this charge as well. Each defendant was sentenced to concurrent periods of incarceration of one year and one day on each count. Execution of the sentences has been stayed pending this appeal.

For the reasons below, we affirm the convictions.

FACTS

Defendants were four of the approximately eighty New York City marshals appointed by the Mayor of the City of New York as officers of the City's Civil Court, who are empowered, inter alia, to enforce judgments issued by

that court. As part of the enforcement function, each marshal, upon request of a Civil Court judgment creditor, may levy upon and sell at publicly advertised auctions the property of a Civil Court judgment debtor.[1] The auctions are conducted either by the marshal himself or by an auctioneer hired by the marshal. After a sale the marshal is entitled to deduct certain statutorily authorized fees[2] and must remit the remainder of the proceeds, up to the amount of the judgment, to the attorney for the judgment creditor; any proceeds in excess of the judgment debt and statutory fees are to be remitted to the judgment debtor.

In 1976 an investigation was begun into the bona fides of the marshals' auction sales. New York City Department of Investigation Detective Edward Gruskin assumed an undercover identity and began attending auction sales as a cash buyer. The investigation culminated in a 25-count indictment in 1978 against eleven marshals, including the four appellants, and two auctioneers for various violations of federal law on account of sales of debtors' property at artificially deflated prices. Seven of the marshals and both auctioneers pleaded guilty to certain offenses,[3] leaving only Angelilli, Butler, Irish, and Ribotsky to be tried. Each of the four defendants was

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1 The marshals' duties also include executing commercial and residential evictions and sending out collection letters on unsatisfied judgments. There was testimony at trial that some marshals concentrated in these areas and did not execute on property.

2 Marshals are paid neither salary nor expenses. Their lawful compensation comes solely from fees as allowed by statute, deducted from the proceeds of the sales of debtors' property.

3 In addition, five auctioneers who were not named in the indictment but were among those later identified by the government as unnamed coconspirators pleaded guilty to charges relating to these activities; and one similarly identified auctioneer was convicted, following a jury trial, of obstructing justice by giving false and evasive answers to the grand jury investigating these activities. *See United States v. Kanovsky*, 618 F.2d 229 (2d Cir. 1980).

charged in four counts: (1) participating in the affairs of the Civil Court through a pattern of racketeering (RICO § 1962(c)); (2) conspiring to so participate (RICO § 1962(d)); (3) extortion under color of official right; and (4) mail fraud. The indictment alleged that the pattern of racketeering activity included multiple acts of extortion and mail fraud; as the case went to the jury the indictment alleged with specificity ten extortionate transactions and five fraudulent mailings by Angelilli, eight extortionate transactions and four fraudulent mailings by Butler, nine extortionate transactions and four fraudulent mailings by Irish, and four extortionate transactions and three fraudulent mailings by Ribotsky. The conspiracy count charged a conspiracy among the four defendants, nine named but unindicted coconspirators, and certain unnamed coconspirators; pretrial disclosure by the government revealed the names of twenty-nine persons in the last category.

A. *The Prosecution's Evidence*

Since only limited attacks are made on the sufficiency of the evidence produced at the five-week, 57-witness trial, a summary will suffice here. The prosecution's evidence consisted principally of the testimony of one of the former marshals who had been indicted and had pleaded guilty to a misdemeanor, the testimony of Detective Gruskin, together with certain tape recordings made by him of conversations at various auctions, and the testimony of about a dozen buyers, several of whom had also been auctioneers for various marshals including one or more of the defendants and all of whom were alleged to have been coconspirators. The witnesses presented the following picture.

Opinion

Two groups of persons were aligned in the auction frauds: the marshals, acting either directly or through their auctioneers, and a group of 20-30 buyers, known by those who frequented the marshals' sales as "the boys." "The boys," who regularly attended the sales, were also referred to by the marshals as "the 40 thieves." Usually one or more of the "the boys" would meet prior to the auction with the marshal who had advertised the auction; they would agree at that time on a deflated price at which the property would ostensibly be sold, and on an amount over the ostensible sales price that "the boys" would pay to the marshal. The latter amount was known as "top money" or "money on top." Sometimes the amount of top money paid was greater than the amount paid at the sham auction.

"The boys" acted in two ways to keep the bidding within the bounds agreed on with the marshals. First, they acted as a coordinated group at the auction to eliminate competitive bidding among themselves at that stage. This united action was called a "kipper." Second, "the boys" attempted in varous ways to discourage outsiders from bidding on the property. These methods consisted principally of misrepresentations as to the existence of liens on the property to be auctioned. After a sham auction "the boys" would hold their own private auction, called a "knockout," at which the property might be sold for as much as twice the amount paid at the marshal's auction. The starting price in the knockout was the total of the sham auction price plus the top money, and the difference between this total and the final knockout price was distributed by the knockout winner to the rest of "the boys." The bids at the knockout often were made in terms of so many dollars per participant rather than in terms of a total price.

Following the marshal's auction, the marshal would send a check to the attorney for the judgment creditor, purporting to represent the price at which the property had been sold at the auction. Needless to say, the checks did not include the "top money" received by the marshal. Butler, Irish, and Ribotsky stipulated that, as to each of the alleged fraudulent mailings attributed to them in the indictment, the checks were sent through the United States mails to attorneys for judgment creditors who regularly did business in interstate commerce.

Detective Gruskin and each of the buyers and auctioneers who testified provided considerable detail as to auctions at which marshals demanded top money. There was evidence as to thirty such transactions which were listed in the indictment as incidents of substantive violations of law; and there was testimony as to some sixteen other transactions, admitted as evidence of other overt acts in furtherance of the conspiracy.

In addition, there was evidence that the practice of demanding top money was pervasive among those marshals who engaged in property executions. All seven of the auctioneers who testified admitted that they had demanded and received top money on behalf of the marshals for whom they conducted auctions, who included not only the four defendants but many other alleged coconspirators. Manuel Ortiz, the former marshal who testified, also admitted having demanded top money. He and all of the buyers and auctioneers testified that it was the custom and practice among marshals at auctions to demand top money. Many of the buyers stated that they had learned about top money at the first marshal's sale they attended; some testified that they had heard about the practice long before, from their fathers who were auctioneers. Ortiz described the practice as a com-

mon topic of conversation among marshals on the occasions of their monthly Marshals' Association meetings or whenever they would get together. He testified that he had discussed the practice with many marshals, including the four defendants on many occasions, and that experienced marshals routinely "educated" newly appointed marshals on the practice.[4] He himself had educated Butler, who had asked how to go about getting money on top.[5]

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4 Ortiz testified in part as follows:

Q Was there a custom and practice in the industry during the years you were a Marshal, namely, from '71 to '78 of a Marshal being paid money on top?

A Yes, sir.

Q And did you personally engage in that conduct?

A Yes.

Q And can you tell us how often you did that, sir?

A For the past three and a half years as a Marshal, I used to conduct sales on a weekly basis, but they would show up every two weeks at my sales.

Q When you say they—

A The 40 thieves.

Q And on those occasions, did you take money on top?

A Yes.

Q Now, did there come a time, sir, that you had conversations with any other Marshal with respect to that practice of taking money on top?

A Yes, I did.

Q And can you tell us, sir, who the other Marshals were that discussed this custom and practice with you?

A You could start out with Pete, Bill, Don.

Q Would you identify them by full names? When you say Pete, who do you mean?

MR. ROSENTHAL: Identification conceded.

A With Butler, Don Irish and Don Ribotsky.

Q And you discussed that practice with these individuals?

A Yes, once in a while.

Q Who else did you discuss it with at—

A Lester Kasper, George Rivera, various other Marshals.

THE COURT: Where would you discuss these matters?

THE WITNESS: At—we used to hold a meeting of the Marshal's [*sic*] Association at least once a month and downstairs in the lounge, we'd get to together before the meeting and talk about things that went on.

(Tr. 2142-43.)

B. *The Defense Case*

The defendants called some three dozen witnesses to refute the charges against them. Butler testified in his own behalf, denying that he had ever accepted any "top

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Q Did there come a time that you did have a conversation with Mr. Ribotsky about this practice?

A Yes.

• • •

Q On that occasion, sir, what did Mr. Ribotsky say to you and what did you say in return?

A He asked me to use Robert Rappaport as an auctioneer for my sales.

Q Did he indicate why he was using him?

A I would get a better break from him [*sic*] with respect to top money.

Q Did he indicate whether he was using Mr. Rappaport at that time?

A I believe he was.

Q When you [s]ay you'd get a better break with respect to top money, was anything further said by Marshal Ribotsky at that time?

A I don't recall.

Q At this time you were a new marshal, is that correct?

A Yes.

Q Did you have similar conversations with marshals other than Mr. Ribotsky and Mr. Kasper?

A Yes.

Q Who did you have those conversations with?

A I had them with—with respect to using auctioneers?

Q Yes.

A With Peter Angellili [*sic*], Don, and Bill Butler and Karic.

Q Any other marshal that you spoke to, sir?

A Rivera Ponte, all the marshals that handle executions.

Q Do you recall at the time you had the conversation with Mr. Butler what was said?

A With Mr. Butler?

Q Yes.

A Well, Mr. Butler took over my office so I had to go over all the procedures with him.

Q When you say the procedures, did you go over the regulations?

A Over the regulations and how the operation of the office was to take place.

Q Did you have any conversation with him about using an auctioneer?

A Yes.

Q Can you tell us what you said to him and he said to you?

money," and indeed denying that he had ever heard the term before the commencement of trial. Irish testified to the same effect, and added that he was hard of hearing.

A At that time I told him to use Walter Jacobson, that he would get a fair shake.

Q Did you explain to Mr. Butler the purpose of using the auctioneer?

A Yes. You use the auctioneer to put a buffer between you and any ensuing investigation that comes up because the auctionner [*sic*] is the one that deals with these buyers.

(Tr. 2146-48.)

Q During the time frame you were a marshal can you describe the custom and practice that was engaged in with respect to money on top?

What happens at sales?

A You would advertise the [s]ale, and the buyers would show up, they would come in and they would look at the merchandise and if they liked it they would come over to you and sometimes they would tell you what they would give you and how much top money they'd give you.

If they didn't like it they'd say, all you have is crap over here and we'll only give you so much, take it or leave it.

Sometimes if we knew the merchandise was pretty good we'd approach them and say we w[an]t so much for this and then we'd sell it, the hammer would come down at that particular price.

Q At a pre-agreed price?

A Yes.

Q Were there occasions where the auctioneer handled the entire deal for you?

A Yes.

Q On those occasions did you have anything to do with the men you referred to as the 40 theives [*sic*]?

A All I had to do w[i]th them is convey my prices to the auctioneer and maybe he would go outside and give it to them.

Q And was it the custom and practice that the auctioneer would return to the marshal and explain as to whether it had been agreed to?

A Yes, agreed or disagreed.

Q And following the agreement then the auction would be conducted?

A Yes.

Q You as a marshal would be advised what the deal was?

A Yes.

Q And you ultimately approved the sale going forward?

A Yes.

(Tr. 2149-50.)

Angelilli did not testify, but called twelve witnesses who stated that they never noticed any unlawful goings-on, and that the prices paid at Angelilli's auctions were fair. Ribotsky (who also did not testify), Butler, and Irish called a total of twenty-one witnesses who testified to their respective good character.

C. *The Verdicts*

The jury was asked to return a general verdict as to each of the defendants on each count. In addition, as to each specific transaction or mailing alleged under the racketeering, extortion, and mail fraud counts, the jury was asked to state specifically whether or not it was proved beyond a reasonable doubt.

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5 Q I believe you told us you got to know Marshal Butler for the first time in 1974 or '75?
A Yes.
Q Is that right?
A 1974.
Q Let us start with 1974.
A Okay.
Q All right.
What is the first time at a marshals' meeting that you recall discussing top money in the presence of or with Marshal Butler?
A The first time?
Q Yes.
A Exact date?
Q No. Approximate date will do. Some time in what, '74, was it?
A '74 or '75 when I discussed it with Marshal Butler.
Q That was discussed at a Marshal's [*sic*] meeting; is that right?
A That's correct.
Q And you said to him, you know there is such a thing as top money; is that right? Is that what you said?
A No. It was common knowledge with all the Marshals, that this was going on.
Q Well, what was discussed if that was common knowledge?
A He wanted to know how you went about it.
Q Marshal Butler sometime in '74 or '75 asked you how you go about dealing in top money; is that right?
A That's right.
(Tr. 2216-18.)

The jury found Butler, Irish, and Ribotsky guilty on all four counts. It found Angelilli guilty on the two RICO counts and the extortion count, but acquitted him of the mail fraud count. With respect to the individual transactions alleged, the jury found as follows: as to Angelilli, six out of the ten alleged extortionate transactions were proved, and none of the five alleged mail fraud transactions was proved; as to Butler, six of the eight alleged extortionate transactions and all four alleged mail frauds were proved; as to Irish all nine alleged extortionate transactions and all four alleged mail frauds were proved; and as to Ribotsky, three of the four alleged extortionate transactions and all three alleged mail frauds were proved.

DISCUSSION

On appeal defendants make numerous challenges to their convictions. Chief among these are the contentions (1) that the RICO statute does not apply to the activities of officials of the New York City Civil Court, (2) that their activities had insufficient impact on interstate commerce to trigger application of RICO or the Hobbs Act, (3) that their uses of the mails were not for the purpose of defrauding within the meaning of the mail fraud statute, and (4) that the admission of evidence as to the custom and practice of City marshals to demand top money was error.[6] We find no merit in the first three contentions. As to the fourth we conclude, on the basis of the record as a whole, that any error regarding the admission of the challenged testimony was not prejudicial.

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[6] We have examined all of defendants' contentions and find them unpersuasive. The contention that the recitation in the indictment of several acts of extortion or several acts of mail fraud in a single count

A. *The Civil Court as a RICO Enterprise*

RICO § 1962(c) provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "Enterprise," as used in § 1962(c) is defined as follows:

> 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity; . . . .

18 U.S.C. § 1961(4). The enterprise in whose activities defendants are alleged to have participated through a

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was impermissibly duplicitous, was waived, *United States v. Viserto*, 596 F.2d 531, 538 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979), and is in any event lacking in merit since no prejudice has been shown, *see United States v. Murray*, 618 F.2d 892, 896-97 (2d Cir. 1980). Ribotsky's contention that a cassette recording of a particular transaction was played for the jury during its deliberations although the cassette had not been admitted into evidence may be technically correct, but any error was clearly harmless. The recording played for the jury was a copy of a tape that had been admitted into evidence, the transcript of which had also been admitted into evidence; Ribotsky has pointed to no significant differences between the admitted tape and the cassette copy. Finally, given the many witnesses who testified to Ribotsky's receipt of top money, Ribotsky's arguments that he was merely a peripheral defendant whose case should have been severed, and that there was insufficient evidence to convict him, are frivolous.

pattern of racketeering,[7] is the New York City Civil Court. Defendants contend that governmental units such as the Civil Court are not enterprises within the meaning of RICO.[8] We disagree.

We begin with the language of the statute. On its face, the definition of "enterprise" is quite broad. We see no sign of an intention by Congress to exclude governmental units from its scope, *cf. United States v. Turkette*, 49 U.S.L.W. 4743 (U.S. June 17, 1981) (construing "enterprise" to include illegal as well as legitimate ventures), and we note three pertinent aspects of the definition that suggest an expansive rather than a restrictive thrust. First, the term "enterprise" is defined to "include[ ]" the entities listed thereafter. The use of the word "includes," rather than a more restrictive term such as "means," "indicates that the list is not exhaustive but merely illustrative." *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Thevis*, 474 F. Supp. 134, 138 (N.D. Ga. 1979). *See also*, 2A C. Sands, *Sutherland on Statutes and Statu-*

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[7] A "pattern of racketeering activity" consists of at least two predicate acts within a ten-year period. 18 U.S.C. § 1961(5). Predicate acts include any act or threat of murder, kidnaping, gambling, arson, robbery, bribery, extortion, or narcotics dealing, which is punishable under state law by imprisonment for more than one year, and include any of a large number of violations of federal statutes including the Hobbs Act and the mail fraud statute.

[8] Defendants argue also that RICO does not apply because the activities of the Civil Court, which is an instrumentality of the City of New York, lack the requisite impact on interstate commerce. Under § 1962(c) the activities of the enterprise need only "affect" interstate commerce, and even a slight effect will suffice. *See, e.g., United States v. Barton*, No. 80-1096, slip op. 2149, 2166 (2d Cir. March 27, 1981), and cases cited therein; *United States v. Mannino*, 635 F.2d 110 (2d Cir. 1980). In the present case this requirement is easily satisfied by the fact, stipulated by all defendants, that "individuals and corporations who regularly engage in interstate commerce, appear as litigants in the Civil Court of the City of New York."

tory Construction 82 (4th ed. 1973) ("A term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning by construction than where the definition declares what a term 'means' "). Second, the use of the word "any" indicates an intent to make the list all-inclusive. The inclusion of "any individual," "any . . . partnership," "any . . . corporation," and so forth, belies an intention to distinguish, for example, between individuals having differing statuses, or between general and limited partnerships, or between business and municipal corporations. Finally, the word "entity" itself is hardly restrictive. It denotes anything that exists. As modified by the word "legal," it suggests that any being whose existence is recognized by law is within the term "enterprise." We conclude that on its face the definition of an enterprise to "include[ ] any . . . legal entity" is unambiguously broad, and that it does not exclude the Civil Court.[9]

This conclusion is bolstered by certain of RICO's substantive goals, which appear to be directed particularly toward governmental entities. For example, "racketeering activity" is defined in § 1961(1) to include bribery, obstruction of justice, and obstruction of State or local law enforcement. The administration of justice and the enforcement of the law are obviously governmental

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9 We find no merit in defendants' argument that because RICO contains a definition of "State," 18 U.S.C. § 1961(2), the definition of "enterprise" excludes states and their instrumentalities because it does not specifically refer to states. The conclusion does not follow from the premise. If one definition is broad enough to overlap part of another, specific reference is pro tanto unnecessary. There obviously is some overlap among the definitions, and no effort to cross-reference. For example, "person" is defined to "include[ ] any individual or entity capable of holding a legal or beneficial interest in property," 18 U.S.C. § 1961(3); the definition of enterprise refers to individuals and entities, although not to persons.

functions, and bribery is "a crime which is peculiar to public officials, including judges." *United States v. Vignola*, 464 F. Supp. 1091, 1096 n.12 (E.D. Pa.), *aff'd*, 605 F.2d 1199 (3d Cir. 1979) (table), *cert. denied*, 444 U.S. 1072 (1980). Section 1961(1) also includes reference to the Hobbs Act, 18 U.S.C. § 1951, which prohibits extortion "under color of official right." Extortion under color of law is a crime which "can only be committed in the context of governmental activity." *United States v. Sisk*, 476 F. Supp. 1061, 1062 (M.D. Tenn. 1979):

> At common law and under most statutes, bribery is limited to a payment given in exchange for the exercise of governmental power. Extortion under color of law is the use of governmental power to force an involuntary payment from another. By making bribery and extortion RICO offenses, Congress [illegible] be said to have understood that these offenses would be committed by governmental officials as a part of their work. Since these offenses can only be committed in the context of the work of a governmental agency, Congress must be taken to have intended that a governmental agency could be one of the types of "enterprises," the affairs of which are conducted through a pattern of racketeering offenses. The connection between the named offenses of bribery and extortion and governmental work is too close to say that government work is not one of the kinds of activity that may constitute a RICO "enterprise."

Id.

Our interpretation of the language of the statute to extend to activities affecting governmental entities is

further supported by the purpose and legislative history of the Organized Crime Control Act of 1970 (the "Act"), Pub. L. No. 91-452, 84 Stat. 922, of which RICO is Title IX. The overriding purpose of the Act, as reflected in Congress's Statement of Findings and Purpose, was to deal with a widespread problem—the infiltration of organized crime into all areas of American life. While Congress was concerned principally with the relationship of crime to legitimate businesses, it does not appear that it intended to exclude the public sector from its assessment of the problem or its search for a cure:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, *and corruption*; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and *to subvert and corrupt our democratic processes;* (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, *threaten the domestic security, and undermine the general welfare of the Nation and its citizens;* and (5) organized crime continues to grow because of defects

> in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

84 Stat. 922-23 (emphasis added). Congress's concern about the infiltration of local governmental units had surfaced repeatedly in the debates on portions of the Act other than the RICO title. *See* comments in the Senate, *e.g.*: "More important, these criminals have, in some localities, established corrupt alliances within the processes of our democratic society: with the police, prosecutors, courts, and legislatures." 116 Cong. Rec. 586 (remarks of Sen. McClellan); "East of the Mississippi, particularly, it is the rare big-city government that is completely free of the fix." 116 Cong. Rec. 596 (reprinting *Time Magazine* cover story of August 22, 1969); "Corrupt officials and bribed law enforcement officers operate as 'a silent conspiracy' in support of organized crime. The syndicate could not continue to operate without corrupt judges and prosecutors, or without the assistance of a handful of bribed police." 116 Cong. Rec. 601 (remarks of Sen. Hruska); *see also* Senate Judiciary

Committee Report's discussion of Title VIII of the Act, the provisions aimed at syndicated gambling: "Finally, Congress finds that corruption and bribery of State and local officials responsible for enforcement of criminal laws facilitate illegal gambling enterprises." S. Rep. No. 617, 91st Cong., 1st Sess. 73 (1969). Similar views were aired in the House of Representatives, *e.g.*: the Act "places in the hands of the prosecution a number of necessary weapons in order to deal with the sophisticated operations of organized crime—including its connections with many public officials." 116 Cong. Rec. 35203 (remarks of Rep. McClory); "organized crime teaches the lesson that the law is for sale and that the road to success is to follow the path of corruption." 116 Cong. Rec. 35216 (remarks of Rep. McDade). Although the congressional discussion devoted expressly to Title IV did not state that governmental entities were to be the beneficiaries of RICO's substantive provisions, neither was there any statement that those entities were to be excepted. And of the three titles of the Act that create substantive offenses, RICO manifestly has the greatest substantive scope, and hence the greatest potential for dealing with corruption: the other two titles deal solely with illegal gambling activities (Title VIII), and with the importation, distribution, and storage of explosive devices (Title XI).

In sum, we view the language of § 1961(4), defining enterprise, as unambiguously encompassing governmental units, and we consider that the purpose and history of the Act and the substance of RICO's provisions demonstrate a clear congressional intent that RICO be interpreted to apply to activities that corrupt public or governmental entities. We note that this view is shared by virtually every other court that has considered the question. *See, e.g.*,

United States v. Altomare, 625 F.2d 5, 7-8 (4th Cir. 1980) (county prosecutor's office); *United States v. Karas*, 624 F.2d 500, 504 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 857 (1981) (county law enforcement officials); *United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980) (County Attorney); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980) (county sheriff's department); *United States v. Grzywacz*, 603 F.2d 682, 685-87 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980) (police department); *United States v. Frumento*, 563 F.2d 1083, 1089-92 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978) (Pennsylvania Bureau of Cigarette and Beverage Taxes); *United States v. Brown*, 555 F.2d 407, 415-16 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (police department); *United States v. Sisk*, *supra*, 476 F. Supp. at 1062 (state governor's office); *United States v. Salvitti*, 451 F. Supp. 195, 199 (E.D.Pa.), *aff'd*, 588 F.2d 824 (3d Cir. 1978) (table) (Redevelopment Authority of the City of Philadelphia); *United States v. Vignola*, *supra*, 464 F. Supp. at 1095-98 (Philadelphia Traffic Court).[10]

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[10] The only contrary decision of which we are aware is *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976) (*"Mandel"*), *aff'd on other grounds en banc by an equally divided court*, 602 F.2d 653 (4th Cir. 1979), in which the district court dismissed a count of an indictment on the ground that a state could not be a RICO enterprise. The government did not appeal the dismissal of that count. Subsequently, however, in *United States v. Baker*, *supra*, the Fourth Circuit specifically rejected the view of the district court in *Mandel*. The district court's decision in *Mandel* was relied on in the dissenting opinion in *United States v. Grzywacz*, *supra*, which contended that a police department could not be a RICO enterprise. The defendants here rely on the latter opinion and *Mandel* in arguing that the principle of *ejusdem generis* requires an interpretation of "enterprise" that excludes governmental bodies. They argue that since the phrase "or other legal entity" is preceded by "individual, partnership, corporation, [or] association," the term "legal entity" must be deemed limited to one of "the common legal forms in which business entities and labor groups fashion themselves to carry out their private function." *United States v. Grzywacz*, *supra*, 603 F.2d at 691 (dissenting opinion), quoting *Mandel*, *supra*,

We find no merit in defendants' argument that the introduction in RICO of civil remedies such as divestiture and forfeiture of the defendant's interests in an enterprise compel the conclusion that governmental entities are not enterprises within the meaning of RICO. The fact that a convicted official will have no forfeitable property interest in a governmental unit does not suggest that that unit cannot be a RICO enterprise. As the Supreme Court stated recently in *United States v. Turkette, supra,* in rejecting a similar challenge to the inclusion of unlawful activities as RICO enterprises,

> [e]ven if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept. Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to

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415 F. Supp. at 1021. We find this argument unpersuasive since we believe the congressional intent appears clearly to the contrary. "The rule of *ejusdem generis* is no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute." *United States v. Turkette, supra,* 49 U.S.L.W. at 4744. It is

> a useful tool of construction resorted to in ascertaining legislative intent. The rule should not be employed when the intention of the legislature is otherwise evident . . . . Nor should it be applied to defeat the obvious purpose of the statute or to narrow the targets of Congressional concern.

United States v. Frumento, supra, 563 F.2d at 1090.

For a similar reason we reject defendants' argument that the "principle of lenity" requires an interpretation that excludes governmental entities. The principle of lenity, like *ejusdem generis,* applies only where the statute is ambiguous. *United States v. Turkette, supra:*

> There being no ambiguity in the RICO provisions at issue here, the rule of lenity does not come into play . . . . ("The canon in favor of strict construction [of criminal statutes] . . . is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.") . . . .

49 U.S.L.W. at 4746 n.10 (citations omitted).

> argue that their existence limits the scope of the criminal provisions.

49 U.S.L.W. at 4745 (footnote omitted). To the extent that the remedy of forfeiture might be invoked to remove a defendant from his official position, we do not see its application as impermissibly altering sensitive federal-state relationships, by "displac[ing] the State's freedom to structure integral operations in areas of traditional governmental functions." *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). "In most instances, the issue would be moot since convicted felons are usually removed from office automatically." Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes*, 69 J. of Crim. Law & Criminology 1, 13 n.108 (1978).

Nor do we find persuasive the argument that if the term "enterprise" is broad enough to include the New York Civil Court it would also be broad enough to include a federal court or other federal agencies, and that such a result could not have been intended in view of the many provisions in the Criminal Code dealing with corruption of federal officials. The existence of other provisions is not a persuasive argument for construing "enterprise" so narrowly. RICO was not intended to supplant these provisions. Section 904(b) of Title IX, 84 Stat. 947, provides that

> [n]othing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

RICO contemplates an overlap with other provisions of the Criminal Code. An essential element of a RICO

violation is the commission of two or more predicate acts, all of which are crimes under state or federal law, 18 U.S.C. § 1961(1), and a defendant may be punished separately for the RICO violation and the predicate crimes. *E.g., United States v. Boylan,* 620 F.2d 359, 361 (2d Cir.), *cert. denied,* 101 S. Ct. 103 (1980). The Act expressly sought to establish new penal prohibitions, and to provide enhanced sanctions and new remedies. 84 Stat. 923. And RICO was intended to augment other provisions of the criminal law, and not to limit or be limited by them. *See United States v. Barton,* No. 80-1096, slip op. 2149, 2171-76 (2d Cir. March 27, 1981).

B. *Hobbs Act Jurisdiction*

The Hobbs Act provides that it is unlawful to "affect[ ] commerce . . . by . . . extortion." 18 U.S.C. § 1951(a). Extortion is defined in pertinent part as "the obtaining of property from another, with his consent, induced . . . under color of official right." 18 U.S.C. § 1951(b)(2). Each defendant was alleged to have affected commerce by obtaining "top money" from "the boys" under color of official right. Defendants contend that the government failed to prove that the taking of top money affected commerce. Angeliili argues in addition that there was no proof that any of the four "boys" from whom he was proven to have received top money was engaged in commerce. To the contrary, we find adequate evidence to support a conclusion that commerce was affected.

The jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. *See United States v. Gambino,* 566 F.2d 414, 418 (2d Cir. 1977), *cert. denied,* 435 U.S. 952 (1978). Even a potential or subtle effect on commerce will suffice. *See United States v. Augello,* 451 F.2d 1167, 1170

(2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972); *United States v. Calder*, 641 F.2d 76, 78 (2d Cir. 1981); *United States v. Tropiano*, 418 F.2d 1069, 1076-77 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). In *Calder*, for example, we found the requisite impact on interstate commerce in the extortion of $300 per week from a restaurant that had no liquor license, but that purchased de-alcoholized wine from a Canadian company.

In the present case there was ample evidence that many of "the boys" did business in interstate commerce. They purchased goods from out-of-state buyers and resold in New York; they purchased in New York, advertised in the *New York Times* (which the district court took judicial notice is circulated outside of New York), and sold to buyers from outside the state.

As for Angelilli's individual contention, we note that one of the four persons who purchased from him testified that he sometimes sold to out-of-state buyers the merchandise he had bought at marshals' auctions. And in any event, since "the boys" acted as a unit in purchasing at the collusive price at the marshals' auctions, a marshal's sale to one of "the boys" who himself happened not to engage in interstate transactions would nevertheless have the required effect on interstate commerce since he was "kippered" with those who dealt interstate. The evidence of effect on commerce was sufficient as to all defendants to sustain the Hobbs Act convictions.

C. *Mail Fraud*

The mail fraud statute provides as follows:

> Whover, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, *for the purpose of executing such scheme or artifice or attempting so to do,* places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (emphasis added). The government charged that defendants violated the mail fraud statute when, after rigging the auction prices of the judgment debtors' property and taking their "top money," they mailed to the judgment creditors' attorneys checks representing the proceeds of the sales, "falsely and fraudulently claiming that the remitted proceeds represented the amount received at the respective sales when in fact they had received additional 'money on top,' which fact was concealed from the judgment creditors." Butler, Irish, and Ribotsky, who stipulated that they mailed certain checks to attorneys who represented judgment creditors, were convicted of mail fraud.[11] They attack their convic-

[11] While Angelilli stipulated that the checks drawn by him and listed in the indictment represented money realized from his auction sales and

tions by arguing that because they had already received their top money before the checks were mailed, their mailings were, as a matter of law, not for the purpose of executing the schemes to defraud. This contention cannot be sustained.

The evidence at trial revealed two respects in which the jury could have found that in fact the mailings were for the purpose of executing the fraudulent schemes. First, the mailings themselves were fraudulent. They represented to judgment debtor and creditor that the property levied on had been sold at a certain price; in fact the collusion between the marshal and "the boys" had resulted in a fraudulently low price, and even the immediate out of pocket cost to the buyers was not revealed, because the "top money" was not reflected in the mailings. In addition, the transmitting of checks representing the proceeds of the sale was a necessary step in executing the schemes because it was designed to lull the debtors and creditors into believing that the defendants had duly sold the property at auction. Had no checks been sent, or had the truth been revealed as to the amount for which the property was sold, the schemes would have failed.

Under the pertinent authorities, it is clear that the defendants' mailings were within the purview of the mail fraud statute. *See United States v. Sampson*, 371 U.S. 75, 80 (1962); *United States v. Pereira*, 347 U.S. 1 (1954). In *Sampson*, the defendants represented that they could help businessmen either to sell their businesses or to obtain loans. Defendants' salesmen received fees from the victims which they converted to cashiers' checks and mailed

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were made payable to attorneys for judgment creditors, he refused to stipulate to having used the mails. The government sought to prove at trial that Angelilli had mailed these checks, but the jury acquitted him of this charge.

to the defendants' regional offices, which in turn mailed form acceptance letters to the victims. The district court dismissed the indictment on the theory that the fraud was complete when the victims paid the fees. The Supreme Court reversed, holding that the

> defendants' scheme contemplated from the start the commission of fraudulent activities which were to be and actually were carried out both before and after the money was obtained from the victims. The indictment specifically alleged that the signed copies of the accepted applications and the covering letters were mailed by the defendants to the victims for the purpose of lulling them by assurances that the promised services would be performed. We cannot hold that such a deliberate and planned use of the United States mails by defendants engaged in a nationwide, fraudulent scheme in pursuance of a previously formulated plan could not, if established by evidence, be found by a jury under proper instructions to be "for the purpose of executing" a scheme within the meaning of the mail fraud statute.

371 U.S. at 80-81. *See also United States v. Ashdown*, 509 F.2d 793, 800 (5th Cir.), *cert. denied*, 423 U.S. 829 (1975) (mailing of stock certificates and confirmations of stock purchases are sufficiently connected to scheme to constitute mail fraud: "post-purchase mailings which are designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are mailings in furtherance of the scheme."); *United States v. MacClain*, 501 F.2d 1006, 1011-12 (10th Cir. 1974). Such "lulling" mailings are essential to the fraudulent schemes in cases like *Sampson* and the present one, where the frauds are "not isolated and unrelated

swindles," *Bliss v. United States*, 354 F.2d 456, 458 (8th Cir.), *cert. denied*, 384 U.S. 963 (1966) (defendant mailed a few initial payments to victim-investors while simultaneously seeking other victims), and where "the scheme continues and repeats over an extended period of time." *United States v. Boyd*, 606 F.2d 792, 794 (8th Cir. 1979) (mails used as part of continuing scheme to obtain federal grants from which defendant took kickbacks).

Defendants' reliance on the Supreme Court's decisions in *United States v. Maze*, 414 U.S. 395 (1974); *Parr v. United States*, 363 U.S. 370 (1960); and *United States v. Kann*, 323 U.S. 88 (1944), is misplaced. In each of those cases, the fraud was complete prior to the mailing, in that the defendant had already received all of the purloined property or services and had no further communication with the defrauded party. In *Kann*, for example, the fraud alleged involved diversion of funds from one corporation to a dummy corporation; the scheme was completed when the phony checks were cashed, and the funds received, by the defendants. The alleged mailings were made by the check-cashing bank, to collect from the drawee bank. Although the defendants initiated this chain of events, the mailing was held entirely unnecessary to their scheme. In *Maze*, the defendant had charged food and lodging on a stolen credit card. The fact that the merchants later mailed a bill to a bank, which in turn mailed a bill to the card's rightful owner for payment, was held incidental—and indeed counterproductive—to the scheme.

In the present case, given the defendants' own need to communicate with the victims of their fraud, and to make fraudulent representations in those communications, we conclude that the mailings were made for the purpose of executing a scheme within the meaning of the mail fraud statute.

D. *Evidence of Custom and Practice*

We turn finally to the defendants' challenge to the prosecution's evidence that the demand and acceptance of top money was a regular custom and practice of the New York City marshals.[12] The defendants contend that the admission of such evidence was error and was highly prejudicial to them. For the reasons that follow, we find no basis for reversal.

The government elicited testimony from no fewer than 13 witnesses—all of the buyers, all of the auctioneers, and former marshal Ortiz—that it was the custom and practice of marshals to demand, either directly or through their auctioneers, money on top. The rationale on which this evidence was offered and received is not wholly unobscured. When the prosecutor posed the first custom and practice questions early in the trial, the district court allowed the testimony as "background," instructing the jury at that time that "it does not bind any defendant. This is just background as to what happens if you believe his testimony in the cases where there are fraudulently conducted sales." (Tr. 241.) Despite mention of a different rationale shortly thereafter in the absence of the jury,[13]

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12 Testimony was elicited with respect to certain other customs and practices as well, including the related custom and practice of "the boys" to discourage outsiders, and certain ministerial customs relating to the signing of the bill of sale after an auction. The custom and practice with which we deal on this appeal is that of the marshals' demanding money on top.

13 On the following day, the court appeared to rule, in the absence of the jury, that this custom and practice testimony was admissible to show the marshals' awareness of wrongdoing:

> The reason I am permitting custom and practice in the trade is because if the Government can show that there was a custom and practice in the trade, and that that custom and practice involved fraudulent auction sales, because they were involved in the trade,

the court several days later in effect reiterated its first instruction during the custom and practice testimony of another buyer: "this is not direct evidence against any defendant, except as the witness indicates that a particular accused participated in it." (Tr. 1094.) Toward the end of the government's presentation of this type of evidence, however, the court informed the jury as follows: "I am admitting evidence on custom and practice because you may from the custom and practice and all the other evidence infer that the defendants engaged in the general custom and practice . . . . " (Tr. 2060-61.)

Nevertheless, by the time the jury was to be charged at the close of the evidence and summations, the district court had revised its view of the proper role of the custom and practice evidence: it instructed the jury that custom and practice evidence could be used only for the limited purpose of assessing whether the government had proven the existence of a conspiracy as charged in Count I of the indictment. The court instructed the jury that neither the custom and practice testimony, nor the evidence of top money demands other than those specifically alleged in the indictment against the four defendants could be used

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the jury from that may infer that they are aware of what they were doing and the specific acts—

(Tr. 412.) The government argues on appeal that the evidence was admissible with respect to the state of mind of the *buyers*, an issue for Hobbs Act purposes. Several of the buyers testified in effect that paying top money was the only way to do business at marshals' auctions because the practice was so widespread; if they did not ante up they could not buy in the future from this marshal, and to buy in the future from other marshals would require payment of top money to the latter. *See, e.g., United States v. Kennedy*, 291 F.2d 457 (2d Cir. 1961). Although this rationale has some merit it does not appear to have been articulated clearly during the trial, and it does not appear that the jury was ever instructed that it could consider the custom and practice testimony for this purpose. Indeed, the court's closing charge was to the contrary. *See infra*.

to prove that the defendants committed any of the substantive crimes charged:

> Now, there was evidence of sales that were not charged in the indictment. Evidence came before you on the custom and practice among marshals in conducting sales, just generally among what was called the business of selling judgment-debtor assets. The evidence of sales that were not charged in the indictment may only be used in determining whether the government established the existence of the conspiracy charged and for no other purpose. The evidence of custom and practice in the conduct of marshals' sales may be considered in determining whether the conspiracy charged was established. It is limited to such use and it may not be considered in determining whether the accused committed the other crimes charged in the indictment.

(Tr. 4847.) The substance of this instruction was repeated in response to the jury's request, shortly after it retired to deliberate, for clarification of "what constitutes conspiracy." The clarification included the following:

> You can take into consideration all the statements made by all the alleged conspirators to determine whether the government proved such a conspiracy. You can take into consideration proof of custom and practice, and as I said, that evidence in solely on the issue as to whether there was such a conspiracy.

(Tr. 4907.)

Defendants argue that the admission of the custom and practice evidence was barred by Fed. R. Evid. 404(b) because that evidence referred to other acts and was

designed to show that the defendants acted similarly. We agree with the district court's final analysis that the custom and practice testimony was admissible for a limited purpose. Such testimony could properly be considered in determining whether or not the government had proven the existence of a broad conspiracy among marshals to demand top money, as alleged in the indictment, but it could not be considered in reaching a finding as to whether or not any of the defendants themselves demanded or received top money. The key to both conclusions is the scope of Rule 404(b).

Rule 404(b) provides as follows:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To the extent that the evidence related to acts other than those charged, it was admissible under the second sentence of Rule 404(b) to show a continuous plan. Insofar as the evidence, on the other hand, reflected a custom and practice that was part of the alleged conspiracy itself, it was not inadmissible under the first sentence of the Rule because the conduct did not represent *other* acts. *See, e.g., United States v. Carroll,* 510 F.2d 507, 509 (2d Cir. 1975), *cert. denied,* 426 U.S. 923 (1976); 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5239 (1978):

> In cases where the incident offered is part of the conspiracy alleged in the indictment, the evidence is

> admissible under Rule 404(b) because it is not an "other" crime. The evidence is offered as direct evidence of the fact in issue, not as circumstantial evidence requiring an inference as to the character of the accused.

Id. at 450 (footnote omitted).

Since the acts were part of the conspiracy, evidence of their occurrence was admissible to prove the conspiracy, regardless of whether they were performed by the defendants or by other coconspirators. *See, e.g., United States v. Araujo,* 539 F.2d 287, 289 (2d Cir.), *cert. denied,* 429 U.S. 983 (1976); *United States v. Papadakis,* 510 F.2d 287, 294-95 (2d Cir.), *cert. denied,* 421 U.S. 950 (1975); *United States v. Costello,* 352 F.2d 848, 854 (2d Cir. 1965), *rev'd on other grounds,* 390 U.S. 39 (1968); *United States v. Bates,* 600 F.2d 505 (5th Cir. 1979); *United States v. Vega-Limon,* 548 F.2d 1390 (9th Cir. 1977); 22 C. Wright & K. Graham, *supra,* § 5239, at 451. In *Papadakis,* for example, we approved the receipt of evidence, to prove the existence of the conspiracy, that on several occasions not charged in the indictment the defendant and others conducted themselves in a manner similar to that charged. And in *Costello,* we stated that

> the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to be linked by quite separate proof.

352 F.2d at 854. Even acts prior to the first act alleged in the indictment may be proven to show the continuing nature of the conspiracy. *Id.*

We see no error in the district court's receipt of evidence as to some of the conspiratorial acts in a somewhat

generalized form. For example, rather than detailing each of the top money demands they had made or witnessed as auctioneers and/or buyers over the years, the witnesses generally testified as to how many marshals' auctions they had attended in those capacities, and estimated in what percentage of those cases top money had been demanded. It was within the district court's discretion, after assuring itself that such evidence was based on personal knowledge, *see* Fed. R. Evid. 403, 602; *see United States v. Brown*, 548 F.2d 1194, 1198 n.13 (5th Cir. 1977), to permit the testimony to be given in that form. Likewise we find no error in the court's permitting these experienced witnesses[14] to draw expert inferences as to the existence of a custom and practice among marshals to demand top money. Their opinions were properly admitted under Fed. R. Evid. 702[15] to assist the jury in

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14 The experience of the witnesses ranged from that of buyer Barry Stampler, who had attended 250-300 marshals' auctions over a two-year period, to that of Nathan Weisser who had been an auctioneer for twenty-eight years.

15 Rule 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The court charged the jury that the testimony as to custom and practice was opinion testimony:

> Witnesses, as I indicated, were called to the stand. They testify only to what the witness saw or heard. There is an exception to that general rule. Witnesses who by reason of education and experience have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for that opinion.
>
> For example, Dr. Ober was called to testify on Mr. Irish's hearing problems. Some witnesses testified that they were familiar with the custom and practice among marshals who were charged with the duty and who performed the duty of selling judgment debtors'

determining whether there was a broad-scale agreement among marshals to demand top money.

While we conclude that the custom and practice evidence was admissible for the purposes we have discussed, we agree with the defendants that Rule 404(b) barred its use to prove that the individual defendants acted in conformity with the custom and practice. The district court ultimately agreed with this view, as evidenced in his final and supplemental charges to the jury. But, as noted earlier, during the testimony of one buyer, the court had instructed the jury that it was permitted to infer from the custom and practice evidence that the defendants individually had engaged in the custom and practice. To the extent that the custom and practice evidence consisted of testimony as to a defendant's other acts, the interim instruction—which made no mention of plan, or knowledge, or any other use of the evidence permissible under the second sentence of Rule 404(b), but instead expressly permitted the inference that the defendant had acted as charged in the indictment—was contrary to the prohibition of the first sentence of Rule 404(b). This use of the other act evidence would require an inference that the other act showed the defendant's propensity to perform acts of that type, and a further inference, from that propensity, that the defendant therefore performed the act charged. *See* 22 C. Wright & K. Graham, *supra*, § 5239, at 460-61. Such a chain of inferences, even if the person who performed the other acts is the person whose

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assets. Because of their experience they could express an opinion as to custom and practice. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. You don't have to accept an expert's opinion at face value. The credibility of the opinions or the testimony of experts is judged like the testimony of any other witnesses.

(Tr. 4811.)

conduct is in issue, is logically so weak that the relevance of the factual evidence will nearly always be outweighed by the probable prejudice resulting from its admission. The logical weakness is the reason for the general prohibition of Rule 404(b):

> The basic reason for the inadmissibility of evidence of other crimes, wrongs, or acts is that such evidence is irrelevant to prove the conduct in question. As Wigmore says, it "has long been accepted in our law . . . [t]hat 'the doing of one act is in itself no evidence that the same or a like act was again done by the same person' . . . ." The reason for this is that our knowledge of the causes of human conduct is too weak to provide any major premise that will support the desired inference. . . .
>
> The only explanatory model for human conduct expressly recognized by the law of evidence is the concept of "character." But our confidence in this construct is so weak that its explicit use is only authorized under special circumstances.

22 C. Wright & K. Graham, *supra*, § 5239, at 436 (footnotes omitted).

Moreover, to the extent that the chain of reasoning requires an inference that the individual defendants committed certain acts based on evidence that other acts were performed by other persons, it is even more tenuous. In giving the interim instruction permitting such an inference, the court apparently relied on Fed. R. Evid. 406, which provides as follows:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is

> relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

We do not believe that this Rule authorized the interim instruction. We begin by noting that the challenged evidence concerned the custom and practice of marshals as a group rather than the "habits" of individual defendants. While various witnesses testified that one or more of the defendants had, on specific occasions, demanded and been paid top money, none testified that it was the habit of such defendant to do so. Thus, the interim instruction permitted the jury to infer conduct of an individual on the basis of the custom of an organization. It may be that the ambiguous structure of Rule 406—which does not link the conduct of a person expressly with proof as to the habit of that person, nor the conduct of an organization expressly with proof as to the routine practice of that organization, *see* 23 C. Wright & K. Graham, *Federal Practice and Procedure* § 5273, at 42 (1980)—was intended to make admissible the evidence of the practice of the organization to prove the conduct of any of its members. As a matter of policy, however, we cannot countenance that application of the Rule here, *see* 23 C. Wright & K. Graham, *supra*, § 5275, at 56, since it would defy the principle of the individuality of guilt to hold that a defendant's mere membership in an organization practicing a particular type of crime could be used to show that the defendant himself committed such a crime. We conclude that the district court's interim instruction, which allowed the jury to use the custom and practice evidence to infer that the defendants demanded top money, was incorrect.

The conclusion that there was error, however, does not end the inquiry, for the Judicial Code instructs us that an incorrect ruling does not require the reversal of a judgment if the error was "harmless":

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

28 U.S.C. § 2111 (1976). The leading criminal case construing the predecessor of § 2111 is *Kotteakos v. United States*, 328 U.S. 750 (1946), and its standards remain authoritative under the present provision. *United States v. Frank*, 494 F.2d 145, 161 n.19 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974). In *Kotteakos*, the Supreme Court pointed out that in evaluating whether an error was harmless an appellate court is not to determine guilt or innocence, nor to speculate upon probable reconviction. 328 U.S. at 763. Rather, it is to determine, "in relation to all else that happened,"

> what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

Id. at 764.

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of

> Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 764-65 (footnote and citations omitted).

After a review of the record as a whole we are convinced, for several reasons, that the district court's erroneous interim instruction did not influence the jury in the slightest. First, the court's final charge gave the jury the correct instruction and gave it in clear, concise, and unambiguous terms: the jury could consider custom and practice only in determining whether the existence of a conspiracy had been proved, not in considering any other alleged crime. Second, the jury did not appear to hark back to the interim instruction, which had been given more than two weeks before the final charge; it never requested reiteration of that earlier instruction; and when it asked for clarification of the court's final charge on conspiracy, it neither singled out the custom and practice portion for particular review, nor appeared to question the court's repeated admonition as to the limited role of that evidence.

Most importantly, contrary to defendants' contention that "the fate of the individual defendants at bar was sealed" by the receipt of the custom and practice evidence, it is clear that the jury did not indiscriminately

find the defendants guilty. As to Angelilli, it found four of the ten alleged extortionate transactions not proved and found all five of the alleged mail fraud transactions not proved. As to Butler, it found two of the eight alleged extortionate transactions not proved. And as to Ribotsky, it found one of the four alleged extortionate transactions not proved. The jury's concentration on individual transactions was evident not only from its ultimate conclusions, but also from the nature of its numerous requests for taped and documentary evidence and for the rereading of certain testimony during its deliberations. In every instance the request related to evidence of specific auctions held or attended by one of the defendants. In no instance did the jury make any request that appeared to be concerned with custom and practice evidence.

Finally, we note that in only one rereading of testimony requested by the jury was there any mention of the custom and practice of demanding top money. This evidence related to a transaction in which the buyer testified that he had paid top money but that he could not recall whether he had handed the money to Butler or to his auctioneer. When asked why he had paid top money, he answered, "Practice and custom I think was the word used here just a few minutes ago." On this single occasion, then, some custom and practice testimony was reread to the jury. This, however, was one of the transactions that the jury found *not* proved.

In all the circumstances we are left with the certain conviction that the erroneous instruction had no effect, and that the custom and practice evidence was not misused.

CONCLUSION

The convictions of all defendants are affirmed. The judgment as to Angelilli is remanded for correction to reflect his acquittal of the mail fraud charge under 18 U.S.C. § 1341.

FRIENDLY, *Circuit Judge,* concurring in the result:

I am unable to agree with the portion of Judge Kearse's excellent opinion that holds the New York Civil Court to be an "enterprise" within the meaning of 18 U.S.C. § 1962(b). No one would think of describing a court as an "enterprise" as a matter of ordinary English speech. Black's Law Dictionary, 5th Ed. defines enterprise as: "A venture or undertaking especially one involving financial commitment." The only pertinent definition in the Random House Dictionary of the English Language is "a company organized for commercial purposes; business firm". Definitions in other dictionaries I have consulted are even less pertinent. The problem here is totally different from that in *United States v. Turkette,* 49 L.W. 4743 (1981), where the Supreme Court criticized the First Circuit for reading the word "legitimate" into Congress' definition of "enterprise". The issue in *Turkette* was whether there was any justification for excluding from the term "enterprise" an association that would normally be deemed to come within it. The question here is whether there is any justification for expanding the term to include something that would normally be deemed to fall outside it. Conceivably the group of marshals who engaged in the sordid activities described by the majority could be deemed an "enterprise". But that was not what

the indictment charged or what the jury was told it must find in order to convict. It is of no consequence, as the majority urges, that obstruction of law enforcement is included in the definition of "racketeering activity" in § 1961(1). As the Court said in *Turkette, supra*, 49 L.W. at 4745:

> The "enterprise" is not "the pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all time remains a separate element which must be proved by the Government.

For these reasons, as well as others expressed by Judge Swygert dissenting in *United States v. Graywacz*, 603 F.2d 682, 690 (7d Cir. 1979), *cert. denied*, 446 U.S. 935 (1980), I would vacate the convictions under RICO, 18 U.S.C. § 1962(c) and (d), but would allow those under the Hobbs Act, 18 U.S.C. § 1951, and the mail fraud statute, 18 U.S.C. § 1341, to stand.

I must also express concern over so much of the discussion of F.R.E. 404(b), as relates to participation of the defendants in similar transactions which were not a part of the conspiracy.[1] I could not at all agree that proof that one of the defendants had performed other acts of the precise nature of those here charged during much the same time frame would be "logically so weak that the relevance of the factual evidence will nearly always be outweighed by the probable prejudice resulting from its admission." Opinion, pp. 26-27. The crimes here charged

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[1] As to acts which were a part of the conspiracy, I agree that Rule 404(b) has no application since these would not be "other crimes". Since it is not at all clear that the evidence of custom and practice did include any act of defendants that were not a part of the conspiracy, this portion of the opinion may well be unnecessary dictum.

were sufficiently unusual that such evidence would have been highly relevant as proof of design or system under Rule 404(b), see 2 Wigmore, Evidence, § 304 at 249 (Chadbourn rev. 1979)—"such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." McCormick also approves the use of evidence of other crimes by the accused "so nearly identical in method as to earmark them as the handiwork of the accused"—a device " so unusual and distinctive as to be like a signature", Evidence, § 190 at 449 and cases cited (Cleary ed. 1972). Judge Weinstein's Treatise on the Federal Rules of Evidence agrees that Rule 404(b) permits proof of prior crimes by the accused "when details of the crime show an individuality that, if repeated, are highly probative of the conclusion that they were committed by the same person." 2 Evidence ¶ 404.16 at 404-92-93 and cases cited in notes 21 and 22 (1980). Indeed, the Wright & Graham treatise cited by the majority seems to acquiesce in this view. See 22 Wright & Graham, Federal Practice and Procedure, § 5244 at 501 (1978). While it would have been appropriate for the judge to explain the limited basis for which the evidence was admitted, he was not bound to do so, at least in the absence of a request. See 2 Weinstein, *supra,* ¶ 404.19 at 404-117-119.

ORDER AFFIRMING JUDGMENT OF CONVICTION DATED SEPTEMBER 4, 1981

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of September, one thousand nine hundred and eighty-one.

Present:

HENRY J. FRIENDLY,
WALTER R. MANSFIELD,
AMALYA KEARSE,
Circuit Judges,

80-1431-1434

UNITED STATES OF AMERICA,

Appellee,

v.

PETER ANGELILLI, WILLIAM BUTLER, DONALD IRISH, and DONALD RIBOTSKY,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Order

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

s/ Henry J. Friendly
HENRY J. FRIENDLY

s/ Walter R. Mansfield
WALTER R. MANSFIELD

s/ Amalya Kearse
AMALYA KEARSE

Circuit Judges

ORDER OF THE UNITED STATES COURT OF APPEALS DATED NOVEMBER 5, 1981

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fifth day of November, one thousand nine hundred and eighty-one.

Filed Nov. 5, 1981
A. Daniel Fusaro, Clerk

Nos. 80-1431
80-1432
80-1433
80.1434

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PETER ANGELILLI, WILLIAM BUTLER, DONALD IRISH and DONALD RIBOTSKY,

Defendants-Appellants.

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Peter Angelilli, William Butler, Donald Irish and Donald Ribotsky.

Order

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ A. Daniel Fusaro
A. Daniel Fusaro
Clerk

s/ Francis X. Guidhart
Chief Deputy Clerk

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Due Process Clause of the Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

18 U.S.C. §1961(4):

> "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]"

18 U.S.C. §1962(c):

> ". . . any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. §1962(a):

> "(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the

proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purpose of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities or any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer."

18 U.S.C. §1962(b):

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

18 U.S.C. §1962(d):

"The final substantive RICO crime makes it 'unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.'"